Supreme Court, U.S.
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No. 92-211

In The

Supreme Court of the United States

October Term, 1992

STATE OF OKLAHOMA, COMMISSIONERS OF THE LAND OFFICE,

Petitioner,

v.

RANDY L. CROOK
and
JOHN WEDMAN
and
UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF FOR UNITED STATES IN OPPOSITION

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I. IDENTITY OF PETITIONER FOR ELEVENTH AMENDMENT PURPOSES

In its Brief in Opposition, the United States notes in passing that "the State of Oklahoma is not a party in this litigation, but rather appears *ex relatione* for the Commissioners of the Land Office." Brief for the United States in Opposition at 3 n.3. What legal conclusion – if any – is to be drawn by this Court from that observation is unstated. But if the United States intends any implication that the Commissioners of the Land Office [CLO] and the State are distinguishable for Eleventh Amendment purposes herein, such a view would be manifestly incorrect.

The Eleventh Amendment bars unconsented federal jurisdiction not only over States, but State agencies and departments as well. *E.g., Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). This Court has drawn the relevant distinction between state "political subdivisions," which receive no Eleventh Amendment protection, and "arms," "departments," or "instrumentalities" of the State, which do. *E.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 176 n.22 (2d ed. 1988).

CLO is clearly an instrumentality of the State of Oklahoma. The grantee of the lands and moneys provided by Congress in the Oklahoma Enabling Act was the State. Act of June 16, 1906, § 7, Pub. L. No. 59-234, 34 Stat. 267, 272. *Cf.* OKLA. CONST. art. XI, § 1 (acceptance of grant as *State;* faith of *State* pledged to preserve corpus of grant). Moreover, all three specific criteria established by this Court for the satisfaction of Eleventh Amendment-protected status are met herein. First, while this Court has looked to the existence *vel non* of legislative control in

drawing the "political subdivision"/"State instrumentality" distinction, *e.g., Lake Country Estates v. Tahoe Regional Planning Auth.*, 440 U.S. 391, 402 (1979), CLO, and authorization for legislative rules and regulations, were constitutionalized at statehood. OKLA. CONST. art. VI, § 32. Second, while this Court has looked to the level of government (State or local) which has traditionally performed the function in question, *Lake Country Estates*, 440 U.S. at 402, administration of State lands has traditionally been a State function. Third, this Court has looked to the ability of the entity in question to levy taxes or incur bonded indebtedness on its own. *E.g., Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 280 (1977). CLO has no such authority. In consequence, CLO and Oklahoma are legally indistinguishable for Eleventh Amendment purposes.

II. MISCHARACTERIZATIONS OF OKLAHOMA'S ANALYSIS OF 11 U.S.C. § 106(c)

While Oklahoma will, should this Court grant the Writ herein, vigorously dispute the United States' interpretations of 11 U.S.C. § 106(c) and a number of this Court's Tenth and Eleventh Amendment decisions, it is well aware that such argumentation is inappropriate in this Reply.

But in two areas, both relating to the dispute concerning the meaning and applicability of 11 U.S.C. § 106(c), the United States, in its Brief in Opposition, has mischaracterized Oklahoma's analysis as presented in its Petition. Petitioner Oklahoma will therefore attempt to briefly correct and clarify the record in these two respects.

First, the United States asserts:

> *Petitioner does not dispute* that, if Section 106(c) is not to be rendered meaningless, it must mean at a minimum that Code sections containing the trigger words apply to governmental units, *and that the bankruptcy courts may therefore issue orders affecting the interests of States so long as they do not award monetary relief.*

Brief for the United States in Opposition at 6 (emphasis added). The assertion is incorrect.

Apart from the other arguments proffered by Oklahoma relating to Section 106(c) in its Petition, see Petition for Certiorari at 18-21, the central focus of Oklahoma's argumentation relating to Oklahoma's first Question Presented, see *id.* at 12-17 was that this Court's caselaw, *e.g.*, *Cory v. White*, 457 U.S. 85 (1982), precludes the exercise of *any form of* unconsented federal jurisdiction (injunctive *or* monetary) over a State *which is not and cannot be alleged to be in violation of federal law.* Thus, Oklahoma *has* manifestly and vigorously disputed – in the record – "that the bankruptcy courts may . . . issue orders affecting the interests of States so long as they do not award monetary relief."[1]

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[1] On a closely related matter, the United States also asserts:

> *Petitioner has not, however, offered any reading of Section 106(c)* that would not authorize, at a minimum, the bankruptcy courts to write down the claims of *governmental units* and confirm plans affecting their claims.

Brief for the United States in Opposition at 6 n.6 (emphasis added). That assertion is misleading.

First, "governmental units," as defined in 11 U.S.C. § 101(27), are not fungible for Eleventh (or Tenth) Amendment

Second, the United States asserts:

> And *petitioner cites no decision from this or any other court* that would call into question the applicability of Section 106(c) to the circumstances of this case.

Brief for the United States in Opposition at 6 (emphasis added).

If the United States means by that statement that *pursuant to the United States' interpretation* of cases such as

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purposes. While Petitioner does not dispute (and, indeed, would have no standing to dispute) the applicability of 11 U.S.C. § 106(c), in various circumstances, to "governmental entities" *which are not States* [nor does it, contra to the United States' implication, *see* Brief for the United States in Opposition at 15, proffer any wholesale challenge to the "constitutionality of the Bankruptcy Code . . . "], the essence lies in the detail of Oklahoma's analysis of 11 U.S.C. § 106(c) *insofar as States are concerned*. Thus, again contra to the United States' assertion, *see* Brief in Opposition at 6 n.6, the instant case presents concrete issues, not "theoretical" ones, to this Court.

Second, as this Court is aware, definitive interpretation of 11 U.S.C. § 106(c) has yet to be achieved, almost fifteen years after its enactment. *See, e.g., United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015-16 (1992). As this Court is also aware, both space limitations in, and the nature of certiorari petitions do not provide a forum for lengthy exegeses of potential interpretive approaches to complex (and, in the instant case, paradoxically worded) statutes. But at the Court of Appeals level (and to the extent permitted by space limitations in that forum), Oklahoma *did* tender a rather detailed and systematic approach to interpreting 11 U.S.C. § 106(c), pursuant to which bankruptcy relief would be unavailable herein, but pursuant to which that provision would not be rendered meaningless. See Appellant's Consolidated Opening Brief (Tenth Circuit), *filed* July 18, 1991, at 26-30. Petitioner Oklahoma wishes to respectfully call that portion of the record to the attention of this Court.

United States v. Nordic Village, Inc., 112 S.Ct. 1011, 1015-16 (1992), *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 102 (1984), *Cory v. White*, 457 U.S. 85, 88-91 (1982), and *Quern v. Jordan*, 440 U.S. 332, 347-348 (1979), Section 106(c) is fully applicable to the facts of this case, then no further clarification is required. But if the United States means that Petitioner Oklahoma has cited no authority in support of its theory that "call[s] into question the applicability of Section 106(c) to the circumstances of this case," then Oklahoma respectfully calls to the attention of this Court the fact, which this Court will discover, that these cases – and more – are invoked by Oklahoma in its Petition for precisely that conclusion. See Petition for Certiorari *passim*.

CONCLUSION

Oklahoma respectfully prays that this Court issue the Writ herein.

Respectfully submitted,

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